

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

COMPANY APPLICATION No 276 of 1996

in

COMPANY PETITION No 160 of 1996

For Approval and Signature:

Hon'ble MR.JUSTICE S.D.PANDIT

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

SAURABH N. SOPARKAR

Versus

O.L. OF RENCO GEARS LTD.

Appearance:

MRS SWATI S SOPARKAR for Petitioner

OFFICIAL LIQUIDATOR for Respondent No. 1

DS AFFI. NOT FILED for Respondent No. 2, 3, 4, 5, 6, 7, 8, 9,10,11

CORAM : MR.JUSTICE S.D.PANDIT

Date of decision: 12/02/97

Saurabh Soparkar has filed the present application under section 446 of the Companies Act, 1956.

2. Company petition no.160 of 1996 was filed in this Court against Renco Gears Ltd., a company registered under Companies Act, 1956 to pass an order of winding up of the said company and this Court was pleased to allow the said company petition and necessary order has been passed to wind up the said company, namely Renco Gears Ltd. Before passing of the said order of winding up of the said company, the respondent no.2 in this application namely Sociedade De Fomento Industrial Ltd., had lodged a private complaint bearing no. 48/N/96/D under section 138 of the Negotiable Instruments Act against the said company as well as Directors of the said company. In the said complaint, the respondent no. 2 has named the present applicant before me as one of the accused as a Director of the said company. It is the case of the applicant that that he had ceased to be the director of the said company Renco Gears Ltd. prior to the date of the cheques which was issued and which were subject matters of the prosecution under section 138 of the Negotiable Instruments Act. Therefore, in these circumstances, he has filed the present application with following prayers:

(a) Criminal case no. 48/N/96/D filed by the second opponent against the Renco Gears Ltd. (In liquidation) and other parties in the court of the Judicial Magistrate First Class at Margao, Goa be transferred to and tried by this Hon'ble Company Court;

(b) Criminal case no. 47/N/D filed by the second opponent against the Renco Gears Ltd. (In Liquidation) and other parties in the court of the Judicial Magistrate First Class at Margao, Goa be stayed so long as permission of this Hon'ble Court under section 446 of the Companies Act is not obtained;

(c) Pending the hearing and final disposal of this application to stay further proceedings in Criminal case no. 47/N/96/D filed by the second opponent against the Renco Gears Ltd. (In liquidation) and other parties in the court of the Judicial Magistrate First Class at Margao, Goa.

3. The first prayer of the applicant is that criminal case no. 48/N/96/D filed by the second respondent be transferred from the Court of the learned Judicial Magistrate, First Class at Margao, Goa to this

Court. In support of that prayer, Mr. Thakore, learned counsel appearing for the applicant drew my attention to the provisions of sub-section (3) of section 446 of the Companies Act. In order to consider that submission of his, as well as to consider all the prayers of the applicant, it is necessary to consider the provisions of the whole section 446 of the Act which is running as under:

"446(1) When a winding up order has been made or the Official Liquidator has been appointed as provisional liquidator, no suit or other legal proceeding shall be commenced, or if pending at the date of the winding up order, shall be proceeded with, against the company, except by leave of the Court and subject to such terms as the Court may impose.

(2) The Court which is winding up the company shall, notwithstanding anything contained in any other law for the time being in force, have jurisdiction to entertain, or dispose of-

- (a) any suit or proceeding by or against the company;
- (b) any claim made by or against the company (including claims by or against any of its branches in India);
- (c) any application made under section 391 by or in respect of the company;
- (d) any question of priorities or any other question whatsoever, whether of law or fact, which may relate to or arise in course of the winding up of the company or;

whether such suit or proceeding has been instituted, or is instituted, or such claim or question has arisen or arises or such application has been made or is made before or after the order for winding up of the company, or before or after the commencement of the Companies (Amendment) Act, 1960.

(3) Any suit or proceeding by or against the company which is pending in any Court other than that in which the winding up of the company is proceeding may, notwithstanding anything contained in any other law for the time being in force, be transferred to and disposed of by that Court.

(4) Nothing in sub-section (1) or sub-section (3) shall apply to any proceeding pending in appeal before the Supreme Court or a High Court."

If the above provisions of section 446 are considered, then it would be quite clear that it is expected of the Company Court to transfer all the proceedings which were

initiated before passing of the order of winding up to transfer the same to its own file, in case they had any bearing with the liquidation proceeding which the company court is proceeding. It is not expected of the company Court to transfer other proceedings which have no bearing on the liquidation proceeding and which has no bearing on the funds of the company which has been ordered to be wound up. That would be quite clear from the provisions of sub-section (2) of Section 446 of the Act. Now, if the provisions of sub-section (3) of Section 446 are considered, then it would be quite clear that the power is vested with the company Court to transfer any proceeding to its file.

4. In the instant case, a question has been raised as to whether the proceeding in question, namely prosecution under section 138 of the Negotiable Instruments Act is covered by the provision of section 446 or not. Mr. Arun Mehta, learned Senior Counsel appearing on behalf of the respondent no. 2 has vehemently urged before me that other proceedings contemplated by section 446 will not include criminal prosecution. In support of the submission of his, he has put reliance on the decision of the Apex Court in the case of S.V.Kondaskar, Official Liquidator and Liquidator of the Colaba Land and Mills Co.Ltd.(In Liquidation) vs. V.M. Deshpande, Income Tax Officer, Companies Circle (8), Bombay and another, 42 Company Cases,168 and he has put reliance on the following observations of the Apex Court.

" While holding these assessment proceedings the Income-tax officer does not, in our view, perform the functions of a court as contemplated by section 446(2) of the Act. Looking at the legislative history and the scheme of the Indian Companies Act, particularly the language of section 446 read as a whole, it appears to us that the expression "other legal proceeding" in sub-section (1) and the expression "legal proceeding" in sub-section (2) convey the same sense and the proceedings in both the sub-sections must be such as can appropriately be dealt with by the winding up court. The Income-tax Act is, in our opinion, a complete code and it is particularly so with respect to the assessment and reassessment of Income-tax with which alone we are concerned in the present case. The fact that after the amount of tax payable by an assessee has been determined or quantified its realisation from a company in liquidation is governed by the Act because the income-tax payable also being a debt has to rank pari passu with other debts due from the company does not mean that the

assessment proceedings for computing the amount of tax must be held to be such other legal proceedings as can only be started or continued with the leave of the liquidation court under section 446 of the Act. The liquidation court, in our opinion, cannot perform the functions of Income-tax officers while assessing the amount of taxes payable by the assessee even if the assessee be the company which is being wound up by the court. The orders made by the Income-tax officer in the course of assessment or reassessment proceedings are subject to appeal to the higher hierarchy under the Income-tax Act. There are also provisions for reference to the High Court and for appeals from the decisions of the High Court to the Supreme Court and then there are provisions for revision by the Commissioner of Income-tax. It would lead to anomalous consequences if the winding up court were to be held empowered to transfer the assessment proceedings to itself and assess the company to income-tax. The argument on behalf of the appellant by Shri Desai is that the winding up court is empowered in its discretion to decline to transfer the assessment proceedings in a given case but the power on the plain language of section 446 of the Act must be held to vest in that court to be exercised only if considered expedient. We are not impressed by this argument. The language of section 446 must be so construed as to eliminate such startling consequences as investing the winding up court with the powers of an Income-tax Officer conferred on him by the Income-tax Act because in our view, the legislature could not have intended such a result."

At the outset, it must be stated that the above observations of the Apex Court will have to be considered in the background of the case before the Apex Court. It is a settled law that the Court has to consider the observations of the Apex Court, while deciding a case before it along with the facts of the case. In that case, it was urged before the Apex Court that the proceedings of assessing income-tax carried out by the Income-tax Officer against the company which has gone in liquidation was contrary to the provisions of section 446 of the Companies Act. The Apex Court has found that the assessment officer would not amount to a Court and as he would not amount to a Court, the proceedings before him could not be said to be other proceedings as contemplated by section 446 of the Companies Act. It has been observed by the Apex Court that it is not possible for the company Court to assess the income and then to levy the tax. The Income Tax is

providing a specific court for assessing income and then to assess income-tax and the Company Court can only, after the decision of the Income-tax Officer of levying of the income-tax can consider the legality or otherwise of the tax levied by the Income-tax Officer and then can pass the order for payment of the same. In the said case before the Apex Court, there is no consideration as to whether the criminal prosecution against a company would fall in the category of other proceedings mentioned in section 446 of the Act.

5. Mr. Mehta has also cited before me the case of the learned Single Judge of this Court in the case of M.B.Parikh, Provident Funds Inspector, Ahmedabad vs. Manekchowk and Ahmedabad Manufacturing Co.Ltd. (In liquidation). It is true that in that case, learned Single Judge of this Court (Coram: B.K.Mehta,J) has held that the prosecution under Employment Provident Fund was not covered by other proceedings as contemplated by section 446 of the Act. In that case, there was a prosecution of the Directors and office bearers of the company which had gone in liquidation. The company was not an accused in hatt prosecution under Employees Provident Funds Act. If the provisions of sections 14 and 14-A of the Employees Provident Funds and Miscellaneous Provisions Act are considered, then it would be quite clear that section 14-A is creating a separate offence if committed by the company and section 14 creates an offence against the direcdtors, officers and other employers of the company besides the company. Therefore, in view of those peculiar facts and circumstances, His Lordship, B.K.Mehta, J has held in that case that for continuation of the said prosecjution, the leave of the Court under section 446(1) of the Companies Act was not necessary. That position is also made quite clear by His Lordship B.K.Mehta, J in the subsequent decision given by him. In the case of ()53,Company cases,519. In the second case, there was a prosecution of the Company and Directors under sections 58-B and 58-C of the Reserve Bank of India, 1934 and Miscellaneous Non-banking Companies Directions, 1973. In that case, the prosecution was against the company and in view of the provisions of section58-C, the Directors of the company become liable for the offence committed by the company and therefore, they were joined as accused and in view of the said provision, it has been held by His Lordship, B.K.Mehta,J that for the continuation of the prosecution, leave of the Court is necessary. If the provisions of section 141 of the Negotiable Instruments Act,1881 are considered, then it would be quite clear

that under the said section, Directors are to be made accused for the offence committed by the company. Admittedly, in the prosecution in question, the cheques were given by the company towards company's debts to the complainant and cheques were dishonoured and hence, the prosecution under section 138 is launched. Therefore, the directors of the company are made accused under section 141 and for the continuation of the said prosecution which is principally against the company's debts, the leave of the Court will be required and the provisions of section 146(1) would be applicable.

6. Thus, in my opinion, in case prosecution of the company under section 138 of Negotiable Instruments Act is pending, at the time of passing of the order of liquidation, in order to continue the said prosecution, leave of the Court which has passed the order of winding up is necessary and the provisions of section 446 would be applicable to such criminal prosecution against the company.

7. Though, I am of the opinion that the provisions of section 446 are applicable to the prosecution in question, I am unable to accept the request of the applicant that the said criminal prosecution under section 138 which is pending in the Court of the Judicial Magistrate, Margao, Goa should be transferred to this Court and this Court should conduct and decide the said prosecution. The said prosecution has no bearing with the liquidation proceeding pending before this Court and the decision of the said prosecution will not have any bearing on the proceeding before this Court and it could not be expected of this Court to conduct the prosecution under section 138 of the Negotiable Instruments Act. Therefore, in the circumstances, the first prayer made by the applicant will have to be rejected.

8. By the second prayer, the applicant wants me to pass an order of stay. If the provisions of section 446 are considered, then it would be quite clear that the said section nowhere says that after passing of the order of winding up of the company, the company court has to issue the stay orders for the pending proceedings. The provisions of section 446 are clear and they themselves have necessary effect according to law. It is for the applicant to bring to the notice of the learned Magistrate the fact that the company which is prosecuted has gone into liquidation on account of the order of winding up passed by this Court and then to give effect to the provisions of section 446(1) of the Act. But this

Court will not issue any stay order to the said Magistrate as prayed by the applicant.

9. The third prayer will not survive in view of the rejection of the second prayer. Therefore, the present petition is not tenable. I therefore, reject the same with no order as to costs.

10. Learned advocate for the applicant states that there was interim order passed earlier in this proceeding. But I have decided proceedings on merits. There is no case for the continuation of interim relief when the petitioner has failed on merits only because the petitioner desires to prefer the appeal. Therefore, in the circumstances, it would not be just and proper to explain the said order. I therefore, reject the prayer for extending the stay order.

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